Subcommittee on Commerce, Manufacturing, and Trade

Hearings on the Federal Trade Commission at 100, February 28, 2014

Written answers to additional questions.

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The Honorable Lee Terry

1. In 1975 and 1980, this Committee placed safeguards on the FTC's authority following a number of large and significant rules the agency issued in the 1970's, including a very controversial rule to regulate children's advertising. These rules have been in place for about 35 years in order to ensure the Commission can promulgate the best rules possible for all businesses and consumers. Congress acted in part because the FTC (unlike some other agencies that have narrower jurisdiction) has vast authority to identify and sanction unfair and deceptive acts or practices across nearly every sector of the economy, and it doesn't focus on specific industry technology or practices. In fact, former FTC Chairman Kovacic has said that "no regulatory agency in the United States matches the breadth and economic reach of the Commission's mandates."

   a. Do you think the FTC has been effective in protecting consumers during the 35-plus years since the FTC Act was amended and changed the procedures for their rule writing authority?

   b. Do you agree that, as current law requires, the FTC should ensure that its rules are narrowly tailored, based on sufficient information, and able to withstand appropriate judicial review?

   CRANE RESPONSE: Respectfully, I am not going to attempt to answer the first four questions since they involve the FTC's Consumer Protection mission, in which I do not claim the same expertise as with respect to the Commission's Competition mission.

2. Here are some of the differences between the FTC Act and the "notice-and-comment" rulemaking that is undertaken by some other agencies.

   - ***Prevalence***: The FTC must identify a pattern of activity – a prevalence, as opposed to one instance – before engaging in a rulemaking. There is no similar requirement in notice-and-comment rulemaking.

- ***Disputed issues.*** If the FTC concludes that there is a disputed issue of material fact in a rulemaking, the agency must permit cross-examination of witnesses in a pre-rulemaking hearing and afford the right to offer rebuttal comment. That gives all parties the opportunity to participate. Those requirements don't apply notice-and-comment rulemaking.

- ***Economic effect.*** When the FTC issues a rule, it is required to provide "a statement as to the economic effect of the rule, taking into account the effect on small business and consumers." That seems eminently reasonable to me, yet it is not required by notice-and-comment rulemaking.

Do you agree that these are good protections both for consumers and businesses?

3. It appears to me that those who argue for the FTC to have general notice-and-comment rulemaking authority under the APA must believe that the FTC does not possess sufficient authority today to identify, penalize and prevent bad actors from taking actions detrimental to consumers. Yet we've heard testimony today and in the past repeatedly about how effective the FTC is, so that doesn't seem consistent. What are your thoughts here?

4. In some specific areas, the Congress has given the FTC targeted authority to use notice-and-comment rulemaking. Some of these instances include the Telemarketing and Consumer Fraud and Abuse Prevention Act (1994), the Children's On-Line Privacy rulemaking required in 1998, and the Gramm-Leach-Bliley Act (1999) regarding financial institutions and consumer privacy. This "case-by-case" approach to notice-and-comment rulemaking ensures that, where it is needed, the FTC can address a specific issue in the manner that Congress has determined.

   a. Do you agree that these specific directions from Congress have been working well?

   b. Would you agree with former FTC Chairman Kovacic when he stated that this is the best approach to FTC rulemaking, given the broad subject matter authority and economic effects that FTC decisions can have across the economy?

5. Some have raised concerns that because the FTC faces a lesser burden in obtaining a preliminary injunction from a federal judge than does the Department of Justice's Antitrust Division, merging parties can reasonably anticipate the possibility of different substantive outcomes depending on which agency has jurisdiction to review the matter. To avoid the potential for these different outcomes, should Congress require the FTC to litigate merger challenges in federal court just as the DOJ is required to?

CRANE RESPONSE: It is my view that there should be no difference in the preliminary injunction standard in FTC and Justice Department cases. I would not necessarily require the FTC to litigate in federal court, but if the FTC seeks a preliminary injunction in federal court, it should have the same obligations of proof and persuasion as the Justice Department does.

6. You testified that "there is little distinction between the agencies in terms of antitrust expertise and economics expertise. Are you arguing that these two functions – the FTC antitrust function and the DOJ's antitrust function – are redundant? Are you arguing to dismantle the Bureau of Competition?

CRANE RESPONSE: The agencies' antitrust functions are largely redundant, with some exceptions, particularly the DOJ's criminal enforcement jurisdiction. If Congress were designing the agencies from scratch, there would be no sense in creating this overlapping and redundant jurisdiction. However, there would be some costs to trying to consolidate them now. I have not spent much time on this option since there does not seem to have been much political will for it. However, as discussed in my book *The Institutional Structure of Antitrust Enforcement*, should Congress be interested in re-examining the agencies' respective functions, there are two possibilities that should be considered: (1) making the FTC a pure consumer protection agency and transferring all antitrust responsibility to the DOJ; (2) maintaining only criminal antitrust enforcement at DOJ, and delegating all civil antitrust enforcement to FTC.

7. An overwhelming majority of the FTC's merger investigations are closed without any enforcement action. Unlike when the FTC files a complaint to challenge a merger, when the FTC closes an investigation, the public typically learns very little about how the agency analyzed the potential effects of the transaction. Such information can be incredibly important to businesses attempting to determine what types of transactions are permissible under federal law. Should the FTC do more to issue so-called "closing letters" to explain its analysis even when it closes a merger investigation?

CRANE RESPONSE: Yes, closing letters are very important and should be issued more often. If a business has been under the cloud of an FTC investigation and then the Commission decides to close the file because it has found no violation of law, it is only fair to disclose that fact. Such letters can also be helpful to explain the Commission's views if there is ongoing private litigation that may be been stirred up by the Commission's investigation in the first place.

8. Because the Department of Justice and Federal Trade Commission share jurisdiction to enforce our antitrust laws, there is a complex "clearance" process in place to determine which agency will review a proposed merger. As some have pointed out, the two agencies don't always agree on which should review a particular deal. A prolonged clearance fight could significantly delay the closing of major merger. What can Congress do to prevent these "clearance" battles? Would a random assignment of cases between the two agencies be better?

CRANE RESPONSE: I don't think that a random assignment of cases would be better. One of the arguments for maintaining two agencies is that each agency has acquired experience with certain industries over the years. For example, the FTC has expertise in pharmaceuticals and the DOJ has expertise in transportation. If random assignment became the rule, it would be really difficult to see the justification for continuing to have two agencies at all.

9. You stated there is no substantial difference in overall expertise between the FTC and the DOJ Antitrust Division. So what is gained by maintaining two separate entities?

CRANE RESPONSE: There is no *overall* expertise advantage in either agency, although, as stated in my last response, sometimes one agency or the other has more expertise in a particular industry. Some antitrust experts worry that such expertise would be lost if the agencies were consolidated. I'm not sure why that would have to be the case. If, for example, the FTC's antitrust jurisdiction were transferred to the DOJ, the DOJ could hire the FTC group that works on pharma matters.

10. You testified that the FTC was designed to be politically independent, but you seem to criticize the agency for responding to the concerns of its authorizing committee. Surely you don't want the FTC to operate with unchecked power? The judicial system surely isn't enough with their limited resources.

CRANE RESPONSE: I'm not criticizing the FTC for being politically responsive. What I'm saying is that the standard Progressive-technocratic narrative for why we have independent agencies—that they're detached from political pressures—is false. In my forthcoming article *Debunking Humphrey's Executor*, I explain how the Supreme Court's account of the FTC in the landmark *Humphrey's Executor* decision is historically off base. Rather than being a uniquely expert, politically detached, and quasi-legislative/quasi-judicial body, the FTC has been politically motivated, no more expert than DOJ, and primarily a law enforcement agency rather than a rule-making or adjudicatory body.

The Honorable Jerry McNerney

1. In written testimony for the Subcommittee hearing on February 28, 2014, you discussed the relationship between the Department of Justice and the Federal Trade Commission with respect to Congressional intent in the FTC Act of 1914 and the Supreme Court's decision in *Humphrey's Executor*, and a more recent observation about how the agencies may have strayed from Congress' vision of political independence, superior expertise of one agency over another in certain areas, legislative and adjudicatory character, and cooperative partnership. As we move forward, can you expand upon how we can ensure that the Department of Justice and the FTC do not have duplicative roles and capabilities?

CRANE RESPONSE: With the exception of criminal enforcement against cartels, which is solely the province of the Justice Department, the DOJ and FTC do have largely duplicative roles and capabilities. Although the agencies do have some different expertise in particular industries, they have similar overall capabilities and do largely the same work in antitrust law. Major policy decisions, such as the 2010 revisions to the Horizontal Merger Guidelines, are undertaken by the two agencies jointly.

As set forth in my responses to Congressman Terry, I think there's a good case to be made for consolidating antitrust enforcement in a single agency. Although there would be some costs to

doing that, there would be considerable benefits to streamlining antitrust enforcement and eliminating the friction that sometimes arises from having two competing agencies doing the same job.